SUPREME COURT, U. S.

FILED
OCT 5 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 687

GENEVIEVE D. SCHREFFLER,
Petitioner,

versus

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, dated and entered April 25, 1967, rehearing denied June 8, 1967, which reversed a final judgment entered by the United States District Court for the Southern District of Florida, Miami Division, which final judgment granted recovery under a life insurance policy pursuant to a jury verdict in favor of Petitioner.

OPINION BELOW

The Opinion of the Court of Appeals (R-267-277) is presently unreported, but will be reported in ——— F2d ———.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). The judgment of the Court of Appeals was dated April 25, 1967 (R-278). A timely petition for rehearing filed by Petitioner was denied by order dated June 8, 1967 (R-296).

QUESTIONS PRESENTED

I. Whether the judgment of the Court of Appeals denied Petitioner her right to trial by jury, as guaranteed by the Seventh Amendment to the United States Constitution, and further whether this deprived her of due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution.

II. Whether it is proper where federal jurisdiction is based on diversity of citizenship for the Court of Appeals to use the federal test of sufficiency of the evidence to review a jury verdict.

CONSTITUTIONAL PROVISIONS INVOLVED

SEVENTH AMENDMENT

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial

by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

FOURTEENTH AMENDMENT

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This action was instituted in a Florida state court and removed by the Respondent, the Prudential Insurance Company of America (hereinafter referred to as Prudential) on the ground of diversity of citizenship and amount in controversy, to the United States District Court for the Southern District of Florida. Petitioner, Genevieve D. Schreffler, sought to recover the accidental death benefit under her deceased husband's insurance policy with Prudential.

Her husband fell, fracturing his hip and necessitating surgery. He died shortly thereafter. The jury trial included the testimony of two treating doctors, Dr. Thomas B. White and Dr. George Richards.

Dr. White repeatedly stated the cause of death to be from the fall (fracture) and resulting surgery (R-14; 17; 18; 52; and 56). He never said anything else was a cause or a contributing cause in Mr. Schreffler's death. Respondent's counsel has admitted this point by stating (at page 4 of his Reply Brief to the Fifth Circuit) that Dr. White testified that the fracture and the treatment of the fracture was **the** active, efficient and procuring cause of the death.

Dr. White did explain that the **mechanism** of death — the last gasp — was **probably** respiratory failure, even though he was not certain "as to the exact means by which this man died" (R-54). While noting the possible **mode** of dying, he categorically stated the **cause** of death ("in and of itself," R-14, line 26) was the accidental fall. The following testimony clarified the important and complete difference between the **cause** of death and the final **mechanism** (mode or means) whereby a person actually dies (R-17):

> Q. In other words, what you are saying, if I may take the liberty of paraphrasing it, is that if a man falls off a building and he breaks every bone in his body, he might get some mucus in his respiratory tract and it (death) would be (by) respiratory failure due to the mucus, due to pulmonary emphysema? That would be the **mode or method** but the **cause** was the **falling** off the building. Is that correct, Doctor? (emphasis added)
> A. Yes, sir.

When a human actually expires from heart stoppage or respiratory failure, this is the final, last moment

of life. The cause of death, as pointed out in the above quoted trial testimony, may be and often is a fall or some other accident. Dr. Richards also recognized this differentiation when he agreed that pulmonary emphysema (respiratory failure), like heart failure, could be classified as the **mechanism** of dying (R-97).

In the Respondent's entire cross and recross-examination of Dr. White, totaling thirty-eight (38) pages of the record, never once did Dr. White say that anything else was a contributing **cause** in Mr. Schreffler's death. In fact at three separate points in Prudential's attorney's own examination of Dr. White, he admitted that the doctor had stated an opinion as to the cause of death and further admitted that the doctor's opinion was that the hip fracture was the cause of death (R-38; 46; and 51-52).

Dr. Richards stated that if it were not for the hip fracture Mr. Schreffler would have "been alive for some time" (R-89). In discussing causation Dr. Richards stated he could not be certain of the cause without an autopsy and there was no autopsy. Dr. Richards was asked if the fracture (fall) and operation could have caused death (R-92), and after objection by Prudential's counsel, Dr. Richards replied that he would "have to answer that, yes" (R-93).

Admittedly, considering all of Dr. Richard's testimony, he did not prefer the opinion that death was caused by the fracture and operation, but he did admit it was one possible explanation. (Obviously, an operating doctor does not relish admitting that his operation caused a patient's death.)

Prudential's motions for directed verdict at the close of the Plaintiff's evidence and again at the close of the entire trial were denied by the trial judge, William O. Mehrtens. The jury decided the accidental fall caused death and found in favor of Mrs. Schreffler. Judgment was entered in accordance with the jury's verdict.

When Prudential later moved for judgment notwithstanding the verdict and for a new trial, these motions were heard and denied by Judge Mehrtens. Prudential appealed the jury verdict.

The Fifth Circuit Court of Appeals reversed, without remanding, and ordered entry of judgment for Prudential. Mrs. Schreffler's Petition for Rehearing was denied.

Mrs. Schreffler now petitions this Court for Certiorari and asks that the judgment of the Fifth Circuit Court of Appeals be reversed and the jury verdict reinstated, or alternatively that a new trial be granted.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE JUDGMENT OF THE COURT OF APPEALS DENIED PETITIONER HER RIGHT TO TRIAL BY JURY, AS GUARANTEED BY THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND FUTHER WHETHER THIS DEPRIVED HER OF DUE PROCESS OF LAW, AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

1. It is estimated that more than fifty million (50,000,000) Americans pay premiums on insurance policies containing an "accidental death" provision. All the beneficiaries of the policies ultimately face the same question raised in this case, namely whether death was accidental under the policy's terms. When litigated this is a factual determination reserved for the jury, with their decision based on the evidence presented.

In a sense this case is reminiscent of a class action with the polestar for the hopes and plans of these millions of citizens, present and future; being the tremendously important right of trial by jury. When a court totally disregards the jury's function (and the jury's verdict), it usurps the very province that protects these policy holders and beneficiaries. This is a complete denial of trial by jury and correspondingly a repudiation of due process of law.

Trial by jury must be preserved. Appellate court "determinations" give unwarranted judicial support to wholesale disregarding of jury verdicts. The recurring importance of this issue is evident in that any erosion of the jury's function will certainly be quickly cited in the future as authority for further usurpation. This is not one problem involving one widow, but rather a significant and recurring question that is related to jury trials generally and accidental death cases particularly. An appellate court cannot be allowed to substitute its opinion for that of the jury's.

Where an appellate court totally disregards competent evidence, the right to trial by jury is effectively abolished, as is due process of law, obliterating the core of our entire legal system. Our historic and traditional safeguards

should not be cast aside by appellate judges substituting their view of the facts for those of the jury, who actually observed and followed the entire proceedings.

2. The Statement of the Case shows that this was a matter for the jury's determination. Dr. White testified that the accidental fall, together with the resulting fracture and operation, caused Mr. Schreffler's death. A brief glance at his testimony will confirm this (R-11-14). Hardly a more categorical medical position as to the cause of death could be stated. (Even Dr. Richards, who as the operating surgeon preferred not to think that the surgery caused death, admitted that the cause **could** have been the fall and resulting surgery (R-92-93).)

The Court of Appeals, in addition to completely disregarding essential medical testimony, also resolved a number of disputed factual questions in favor of the Respondent. This was the basic error that led to this Court's reversal of an appellate decision in **Dick v. New York Life Insurance Co.**, 359 U.S. 437 (1959). Enumeration of each "disputed fact question" is unnecessary, but illustratively the appellate Opinion stated (1) that only Dr. White's testimony need be considered in support of the verdict (R-271); (2) that surgery was successful (R-269); and (3) that Mr. Schreffler's lung condition worsened and he died (R-269).

The determination that surgery was successful is not sustained by the Record. Indeed it is rare that surgery can be termed successful when the patient dies. The inference drawn by the appellate court that Mr. Schreffler died from his lung condition is also a sharply disputed factual issue. By considering only Dr. White's testimony, the

Court of Appeals decided that Dr. Richard's testimony was insufficient to support a verdict in Mrs. Schreffler's favor despite his admission that death could have been caused by the fall and resulting surgery.

3. It has always been an important function of this Court to accept cases for further consideration where the appellate court decisions are so doubtful as to be almost clearly erroneous. Frankly where there is a gross miscarriage of justice, and particularly when coupled with a subtle erosion of legal principles (trial by jury and due process of law), this Court will and should grant certiorari. See **Thompson v. City of Louisville,** 362 U.S. 199 (1960), and **Washington v. United States,** 357 U.S. 348 (1958).

Correcting dubious determinations is certainly a legitimate, and sometimes necessary, basis. See **William vs. Lee,** 358 U.S. 217,218 (1959). Where matters are totally devoid of evidentuary support, this renders them unconstitutional under the Due Process Clause. See **Garner vs. Louisiana,** 368 U.S. 157,163 (1961). Ours is not a case where a federal court merely weighed the evidence, but rather it is a matter where the Court of Appeals totally disregarded the evidence, the factual issues, and the jury's determination.

4. The importance of preserving to litigants their right to trial by jury is of paramount concern. This is certainly justified in that to do otherwise would frustrate the constitutional mandate to preserve to the citizens the right to trial by jury. Not granting certiorari in a case like this would be to accept a hostile philosophy contrary to the safeguarding of the inalienable rights of millions of insureds and beneficiaries.

The criterion used in granting certiorari is not based on who wins or loses in the trial or appellate courts but rather on the more important question of whether the jury's function in passing on disputed issues of fact has been preserved and respected. The power of decision is for the jury in all cases except those where fair-minded juries cannot honestly differ. When federal courts deprive litigants of their right to a jury verdict, special and important reasons arise for the granting of certiorari.

This Court's position was pointedly stated in **Beacon Theatres v. Westover,** 359 U.S. 500,501 (1959), where the Court said as follows:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

The Supreme Court has not hesitated to hold inviolate the right to trial by jury. See **McAllister v. United States,** 348 U.S. 19 (1954), and **Dick v. New York Life Insurance Co.,** 359 U.S. 437 (1959). Numerous courts of appeal have also followed these holdings. See **National Life and Accident Insurance Co. v. Graham,** 8 Cir. 1962, 301 F.2d 439, and particularly the dissent in **Filipek v. Moore-McCormack Lines,** 2 Cir. 1958, 258 F.2d 734, 739, which points out the vast number of cases where the Supreme Court has had to intervene "to restore verdicts judicially scuttled", naming and citing more than twenty (20) cases.

Unfortunately this Court of Appeals has been particularly inclined to substitute its own determinations for

those of the jury. The Supreme Court has been equally quick to reverse these cases and to reinstate the jury verdict. See **Mercer v. Theriot**, 377 U.S. 152 (1964), and **Williams v. Carolina Life Insurance Co.**, 348 U.S. 802 (1954), both of which are strikingly similar to our case, and **Gibson v. Phillips Petroleum Co.**, 352 U.S. 874 (1956).

On other occasions the Fifth Circuit itself has defended the right to trial by jury, declining to usurp the jury's function and using emphatic language similar to that employed by the Supreme Court. See **Revlon Inc. v. Buchanan**, 5 Cir. 1959, 271 F.2d 795,799, where the Court said that despite "skillful cross-examination" bringing out apparent inconsistencies, "the jury had the right to decide which of her statements it would accept"; **Fruit Industries Inc. v. Petty**, 5 Cir. 1959, 268 F.2d 391; and **American Fidelity & Casualty Co. v. Drexler**, 5 Cir. 1955, 220 F.2d 930.

Other circuits have also been guided by the Supreme Court's vigorous upholding of the right to jury trial. See **Smith v. Buck**, 9 Cir. 1957, 245 F.2d 348,349, where the Court was "guided by" the Supreme Court reversals of the appellate court (Fifth Circuit) decisions in **Williams**, supra., and **Gibson**, supra.

Granting certiorari in this case will stabilize the principles of trial by jury and due process of law for the benefit of millions of insureds, beneficiaries and other litigants whose rights are to be determined on debated factual issues presented to juries.

II. WHETHER IT IS PROPER WHERE FEDERAL JURISDICTION IS BASED ON DI-

VERSITY OF CITIZENSHIP FOR THE COURT OF APPEALS TO USE THE FEDERAL TEST OF SUFFICIENCY OF THE EVIDENCE TO REVIEW A JURY VERDICT.

1. The Court of Appeals expressly held that the setting aside of a jury verdict in diversity cases "is governed by federal law" (R-269). This important question as to which rule, state or federal, shall be used in testing the sufficiency of the evidence should be resolved in this Court. Although it has been long recognized as a very significant legal proposition, this Court has not yet determined the issue. See **Dick v. New York Life Ins. Co.**, 359 U.S. 437 (1959), and **Mercer v. Theriot**, 377 U.S. 152 (1964). In **Dick** this Court said:

> Lurking in this case is the question whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship. On this question, the lower courts are not in agreement. Compare Rowe v. Pennsylvania Greyhound Lines, Inc. (CA2 NY) 231 F2d 922; Cooper v. Brown (CA3 Pa) 126 F2d 874; Lovas v. General Motors Corp. (CA6 Ohio) 212 F2d 805, with Davis Frozen Foods, Inc. v. Norfolk Southern R. Co. (CA4 NC) 204 F2d 839; Reuter v. Eastern Air Lines, Inc. (CA5 Ala) 226 F2d 443; Diederich v. American News Co. (CA10 Okla) 128 F2d 144.

The Fifth Circuit has continued (see **Kirby Lumber Corp. v. White**, 5 Cir. 1961, 288 F. 2d 566, 573) this direct

conflict with the decisions of the Sixth Circuit (see **Gilreath v. Southern Railway Company**, 6 Cir. 1963, 323 F.2d 158,162) and with decisions from other circuits. The uncertainty of the law and the clear conflict have been spotlighted by several articles. See "Directed Verdicts and the Right to Trial by Jury in Federal Courts" by John E. Bagalay, Jr., II Modern Practice Commentator 358, November, 1964.

The question of the sufficiency of the evidence to sustain a jury verdict in diversity cases should be governed by state law. The resulting fairness and uniformity would be in keeping with the spirit and philosophy of **Erie Railroad Co. v. Tompkins**, 304 U.S. 64 (1938). The state (Florida) rule is stated as follows:

> The test of whether a jury finding should be set aside by an appellate court is not what an appellate court would have decided had they been on the jury, but whether or not they can say, after viewing the case in its most favorable aspect toward the successful litigant, that the jury as reasonable men could not have found the verdict as they did. **Dade County v. McKenna**, Fla. App.1965, 179 So.2d 401,402.

2. Additionally the Court of Appeals totally failed to follow the basic and established rule that an appellate court should look only to the evidence (and reasonable inferences) favorable to the successful litigant. See **Wilkerson v. McCarthy**, 336 U.S. 53,57 (1949). Here while ostensibly paying homage to this concept, the Court of Appeals proceeded to weigh the evidence and substituted its opinion for that of the jury.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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October 4, 1967

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true copy of the foregoing Petition for Certiorari was hand delivered to DIXON, DeJARNETTE, BRADFORD, WILLIAMS, McKAY & KIMBRELL, Attorneys for Respondent, 9th Floor, Dade Federal Building, Miami, Florida, this 4th day of October, 1967.

THOMAS H. ANDERSON

SUPREME COURT, U. S.

FILED
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CASE No. 687

GENEVIEVE D. SCHREFFLER,

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vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment below of the United States Court of Appeals for the Fifth Circuit.

NOTE: Unless otherwise indicated, all emphasis is supplied.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 376 F.2d 397.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The judgment of the Court of Appeals was entered on April 25, 1967. Petitioner's timely petition for rehearing as appellee below was denied on June 8, 1967.

QUESTIONS PRESENTED

According to petitioner, the petition presents the following questions:

I.

Whether the judgment of the Court of Appeals denied Petitioner her right to trial by jury, as guaranteed by the Seventh Amendment to the United States Constitution, and further whether this deprived her of due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution.

II.

Whether it is proper where federal jurisdiction is based on diversity of citizenship for the Court of Appeals to use the federal test of sufficiency of the evidence to review a jury verdict.

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

Petitioner sued respondent in a Florida trial court. Respondent removed the case to the United States District Court in and for the Southern District of Florida. Petitioner sought to recover under the double indemnity provisions of a group life insurance policy respondent had issued on the life of her husband.

The facts as stated by the Court of Appeals below include the following:

> "The insured, Louden Schreffler, had suffered from asthma and pulmonary emphysema for the ten years preceding his death. Pulmonary emphysema is a chronic and progressive disease which destroys normal lung tissue and prevents transfer of oxygen to the bloodstream in usual amounts. From 1954 until his death in 1962, Schreffler was treated by Dr. Thomas D. White, his family physician.
>
> On the morning of April 24, 1962, Schreffler

(taking the view of the evidence most favorable to plaintiff) tripped and fell at home, breaking his hip. He was admitted to the hospital by Dr. White and underwent surgery to set the fracture. The surgeon was Dr. George Richards, who testified at trial. The surgery was successful, but following it Schreffler's lung condition worsened and he died on May 3." 376 F.2d at 399.

The policy sued on defined "accidental death" as follows:

"PART II. Accidental Death and Dismemberment Benefits.

If the Insured, while this Policy is in force, sustains an accidental bodily injury which results, **directly and independently of all other causes,** in the loss of life, sight or limb by such person within ninety days after the date such injury is sustained * * *

Exceptions and Reductions Applicable to Part II * * * For the purposes of this Part II, no loss shall be considered a loss due to accidental bodily injury if such loss is caused **or contributed to** by (1) bodily or mental infirmity or disease; or (2) any infection, other than a pyrogenic infection occurring through and at the time of an accidental cut or wound." 376 F.2d at 398. [Emphasis and editing the Court's.]

Petitioner obtained a favorable jury verdict and final

judgment in the trial court (R. 253-254). The Court of Appeals reversed, holding that the proofs were insufficient to come within the policy definition of "accidental death". In reaching this conclusion, the Court of Appeals said that:

> "The question of what circumstances justify the setting aside of a jury verdict, like other questions concerning the judge-jury relationship in the federal courts, is governed by federal law. Byrd v. Blue Ridge Rural Electric Co-Operative, 1958, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953, reh. den. 357 U.S. 933, 78 S.Ct. 1366, 2 L.Ed.2d 1375 (1958); ABC-Paramount Records, Inc. v. Topps Record Distributing Co., 5 Cir. 1967, 374 F.2d 455; Shirey v. Louisville & Nashville R.Co., 5 Cir.1964, 327 F.2d 549; Braud v. Baker, 5 Cir. 1964, 324 F.2d 213; 5 Moore, Federal Practice ¶50.06 at p. 2350 (2d Ed. 1966)." 376 F.2d at 399.

The opinion below then discusses the liberal federal rules concerning the sufficiency of the evidence to create a jury question and analyzes the evidence in detail. Having walked "the last mile to pay every heed to the jury's verdict", the Court of Appeals goes on to hold:

> "The Florida Supreme Court has construed substantially similar language in the policy thus:
>
> > 'Double indemnity policies imposing liability when death results from bodily injury effected solely by external, violent and accidental means generally contain an exemption from such liability if death results di-

> rectly from disease or bodily infirmity. When such provisions are construed together or if the accidental injury and the preexisting disease or infirmity cooperate in causing the death of insured, doubled indemnity can not be recovered even though the injury is an active, efficient and procuring cause, provided the disease or infirmity contributes either directly or indirectly to causing insured's death.'

Berg v. New York Life Insurance Company, Fla. Sup.Ct.1956, 88 So.2d 915, 917. The Maccabees v. Terry, Fla.Sup.Ct.1953, 67 So.2d 193. In Decker v. New York Life Insurance Co., 5 Cir. 1964, 328 F.2d 650, 652, a case quite similar to the present one, we said in interpreting Florida law:

> ' * * * [I]t does not follow that death resulted directly and independently of all other causes from the accidental injury merely because the treatment of the injury impaired the treatment of the heart condition with the result that the heart condition took a fatal turn. The decedent died of a preexisting heart condition and hence it was a cause of death. This, we think, is so even though the injury and the treatment of it were active and contributing causes. With the preexisting heart condition, whether called a disease or infirmity, contributing to the insured's death, there can be no recovery on the double indemnity provisions of the policy.'

Dr. White did not testify that the accident and operation, as isolated contemporary occurrences, brought about the insured's death. Indeed, construed in the light of the standard expressed in these cases, Dr. White's testimony admits of no other interpretation than that the insured's death was brought about in part, or contributed to, by the chronic disease. The most tolerant semanticist could not brook any other construction of the expression that 'the method or mode of dying' was the illness. This is also the clear meaning of Dr. White's other explicatory statement that 'the reason he died after the operation was, in my best judgment, the aggravation of his pulmonary emphysema.'

We therefore conclude that the jury had no basis in the evidence to conclude that the insured's death resulted from an accident 'directly and independently of all other causes' within the policy's meaning. Therefore we hold that the trial court should have granted judgment for Prudential notwithstanding the verdict." 376 F.2d at 401-402.

REASONS FOR DENYING THE WRIT

1. Florida substantive law clearly provides that there can be no double indemnity under the present policy "if the accidental injury and the preexisting disease or infirmity cooperate in causing the death of the insured . . . even though the injury is an active, efficient and procuring cause. . . . " BERG v. NEW YORK LIFE INSURANCE COMPANY (Fla.1956), 88 So.2d 915, 917. Pe-

titioner cannot and does not question this Florida insurance law definition of "accidental death" under the instant policy. Accordingly, the opinion below correctly interprets local law in a diversity case.

2. The evidentiary basis for the conclusion below that "the insured's death was brought about in part, or contributed to, by the chronic disease" is set out in footnote 1 of the opinion below. 376 F.2d at 399-400. Dr. White's testimony was the most favorable testimony for the petitioner. The most that can be said for his testimony is that the accidental fall was the "producing cause" or "triggering mechanism" which resulted in a death in which chronic asthma and pulmonary emphysema were also contributing causes. While the insured could have obtained insurance with a different definition of "accidental death", the fact remains that he did not so do.

3. Petitioner's claim that she has been denied rights under the Seventh and Fourteenth Amendments are wholly lacking in substance. The Fourteenth Amendment is inapplicable since no "state" action is involved. The Seventh Amendment expressly permits appellate reversals for insufficient evidence "according to the rules at common law." Cf. DIMICK v. SCHIEDT, 293 U.S. 474.

4. There is admittedly a conflict among the circuit courts as to whether the sufficiency of the evidence to sustain a verdict in a diversity case is tested by state or federal law. DICK v. NEW YORK LIFE INS. CO., 359 U.S. 437. While petitioner now claims that "The question of the sufficiency of the evidence to sustain a jury verdict in diversity cases should be governed by state law" (Petition, p. 13), petitioner claimed the exact contrary below:

"The question of the sufficiency of the evidence to sustain the jury verdict is controlled by federal law. Braud v. Baker (5th Cir.1963), 324 F.2d 213, 216; Shirey v. Louisville & Nashville Railroad Company (5th Cir.1964), 327 F.2d 549, 552; Royal Indemnity Co. v. Curtis, (5th Cir.1958), 256 F.2d 329, 331. In resolving this issue the evidence should be viewed in a light most favorable to the Appellee and she is entitled to the benefit of every legal rational inference. Continental Ore Co. v. United Carbide and Carbon Corp., (1962) 370 U.S. 690, 696; Atlantic Greyhound Corp. v. Crowder, (5th Cir.1949), 177 F.2d 633." (Petitioner's Brief as Appellee below, page 5.)

The doctrine of invited error clearly precludes petitioner from now claiming that state law is controlling. "Generally, at least, suitors may not maintain a position here which conflicts with that taken below; . . . " OHIO EX REL. SENEY v. SWIFT & CO., 260 U.S. 146.

5. Petitioner has made no showing that the Florida test of the sufficiency of the evidence differs from the federal test. Likewise, petitioner has not shown and does not claim that the Florida rule is more favorable to her position than the federal law. Petitioner's second question poses a purely academic point and is a classic example of harmless error.

6. The decision below is correct, in probable accord with this Court's prior decisions, and does substantial justice between the parties. Under the Seventh Amendment, federal courts are under just as much of a duty to

set aside verdicts in "no evidence" cases as they are to uphold verdicts which are supported by "some" evidence.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing, Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, was mailed to the attorneys for the Petitioner, THOMAS H. ANDERSON, ESQ., and RICHARD M. LESLIE, ESQ., 1000 First National Bank Building, Miami, Florida 33131, this 26 day of October, 1967.

JAMES A. DIXON